Supreme Court, U.S.
FILED
SEP 14 1999
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(3)

No. 98-1976

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

SIMON C. FIREMAN,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## REPLY BRIEF FOR SIMON C. FIREMAN, PETITIONER

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The Petitioner Simon C. Fireman continues to request that the Court grant his Petition for Certiorari at this time. Only in the alternative does the Petitioner agree with the conclusion of the United States that "The petition for a writ of certiorari should be held pending this Court's decision in *Nixon* v. *Shrink Missouri Government PAC*, No. 98-963 (to be argued Oct. 5, 1999), and then disposed of as appropriate." (Brief of the United States, p. 9).

A decision by this Court in *Shrink Missouri* could well give rise to a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996)[1]. Preferably, because of the manifest importance of the underlying issue presented and the urgency of time, this Court should grant the Petition now and order an expedited briefing schedule in light of the impending Presidential and Congressional elections in 2000.

The United States argues at pp. 7–9 of its Brief that this Court's decision twenty-three years ago in *Buckley* foreclosed the issuance of a Certificate of Appealability on the underlying issue of the continued constitutional validity of the $1000 campaign contribution limit established by the Federal Election Campaign Act of 1971, 2 U.S.C. § 441a(a)(1)(A). This is not so. Under the doctrine of "predictive demise," a lower court could recognize that this Court might rule that the $1000 campaign contribution limit is outdated and unconstitutional.[2] Chief Justice Rehnquist

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[1] As argued in Arthur D. Hellman, "The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions," 11 Hastings Const. L. Q. 5, 38 n.127 (1983), it "would make a good deal of sense" to hold petitions that even remotely involve issues presented in pending cases, because "[t]he relevance of the plenary decision will often depend on how — and how broadly — the Court resolves the various issues presented. At the time the new case is filed, there may be no way of knowing what the result of the plenary decision will be, or which of several possible grounds ultimately will command a majority."

[2] *Spector Motor Service* v. *Walsh*, 139 F.2d 809, 814 (2nd Cir. 1943) ("And our function cannot be limited to a mere blind adherence to precedent. We must determine with the best exercise of our mental powers of which we are capable that law which in all probability will be applied to

has expressed the view that *stare decisis* applies with less force to constitutional opinions that were hotly contested when decided and questioned by Justices in subsequent opinions. *Payne* v. *Tennessee*, 501 U.S. 808, 827-30 (1991). "Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions." *Ibid.* at 828, and fn. 1, citing those decisions. Whatever the result on the merits, as argued in the Petition the issues are debatable among jurists of reason (and have been so debated); a court could resolve (and has resolved) the issues in a different manner; and the question is adequate to deserve encouragement to proceed further. The issue is therefore eminently appealable.

The failure of the district court and the First Circuit to comply with the mandates of the Local Rules of Appellate Procedure is reviewable by this Court under its supervisory powers, Rule 10.[3] While the First Circuit may not be under

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these litigants or to others similarly situated."); *Vukasovich, Inc.* v. *C.I.R.*, 790 F.2d 1409, 1416 (9th Cir. 1986) ("We conclude that the courts of appeal should decide cases according to their reasoned view of the way the Supreme Court would decide the pending case today."); Bratz, "Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent," 60 Washington Law Review 87, 89, 93, 94-5 (1984); "The Attitude of Lower Courts to Changing Precedents," 50 Yale Law Journal 1448, 1450 (1941); "Supreme Court's Decision Held Not Conclusive on Lower Federal Court," 56 Harvard Law Review 652, 653 (1943).

[3] It is likely that Rule 22 of the Federal Rules of Appellate Procedure as well as the Local Rules of Appellate Procedure required a statement of reasons by the district judge. The 1998 amendment to Rule 22, approved April 24, 1998, before the district court denial of appealability, and effective December 1, 1998, after the denial, was essentially to further clarify the state of the law. In 1996, Pub. L. 104–132, § 103 substituted

the strict obligation to correct the district court's failure to state reasons until it is the subject of a mandamus, the practical effect of its virtual adoption of the district court's Memorandum on the merits in its own denial of appealability placed it in conflict with the other Circuits. The principal relevance of the mishandling below is that the First Circuit's denial of appealability, "[e]ssentially for the reasons given by the district court in its memorandum and order," (App. 1a), places the decisions of both courts below in direct conflict with this Court's decisions spelling out the difference in standards between a question on the merits and the question of appealability. (Petition, pp. 10–12).

The United States concedes that what this Court decides and says in *Shrink Missouri* will be highly relevant to the Petitioner's challenge to the federal campaign contribution

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"Habeas Corpus *and Section 2255 Proceedings*" as the Catchline title of the Rule for "Habeas Corpus Proceedings." (emphasis added). At the same time in 1996, 28 U.S.C. § 2253, the statute addressing Certificates of Appealability, upon which Rule 22 is based, was similarly amended, Public Law 104–132, § 102, so as specifically to apply to § 2255 proceedings as well as § 2254 proceedings.

The Advisory Committee Notes, 1998 Amendments, states:

> [T]he paragraph [22(b)(1)] is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132.

The United States' reliance on *Hohn* v. *United States*, 524 U.S. 236, 244 (1998) is misplaced. While quoting *Hohn* as stating, "On its face, [former Rule 22(b)] applies only to state, and not federal prisoners," it chose not to quote the very next sentence, "It is nonetheless instructive on the proper construction of § 2253(c)." *Ibid.*

limitation. While Petitioner agrees that the Petition should not be denied at this point, he urges rather that it be granted now so that this Court may expeditiously resolve the underlying question presented in the context of the federal statute upon which the statute enacted in *Shrink Missouri* was obviously based.

## CONCLUSION

Therefore, for the reasons expressed herein and in the Petition for a Writ of Certiorari, this Court should either grant the Petition and order an expedited briefing schedule or, only in the alternative, defer consideration of the petition until it

issues its decision in *Shrink Missouri* and then dispose of the Petition as appropriate in light of that decision.

Respectfully submitted,

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Dated: September 14, 1999